United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,162

CLYDE L. HARDY,

Appellant

v.

UNITED STATES,

Appellee

Appeal From the United States District Court for the District of Columbia

STUART J. LAND

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Attorney for Appellant
(Appointed by this Court)

QUESTIONS PRESENTED

Whether on the record of this case, the remarks of the prosecuting attorney and the court on defendant's failure to introduce evidence equally accessible to the prosecution, or immaterial to the issues at hand, constituted prejudicial error?

Whether the requirement by the court below that defense counsel make any motions before the court in the presence of the jury, including a Motion for Directed Verdict, constituted reversible error in the proper administration of justice and in the context of this record?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The District Court's jurisdiction over this case is founded upon the commission of an offense within the District of Columbia. See 11 D.C. Code § 521(a)(2); Indictment. This court's jurisdiction to review the final judgment entered rests upon 28 U.S.C. § 1291.

STATEMENT OF FACTS

This case involves a conviction on both counts of a two count indictment charging housebreaking in violation of § 1801, 22 D.C. Code and larceny of property of the approximate value of $400, in violation of § 2201, 22 D.C. Code.

Upon defendant's conviction, the District Court (Judge Holtzoff) sentenced him to imprisonment for a term of 20 months to five years on each count, the sentence on each count to run concurrently.

The offenses involved: the evidence at the trial established that Mr. and Mrs. Pierre Moussa, residing at 1547 - 33rd Street, were in Europe from December 1963 until January 22, 1964 (Tr. 8-9). When they returned they found the basement door of the house had been broken into and a number of items taken from the house, such as a transistor radio of two-three year vintage, a year-old phonograph, an old slide projector and two cases of whisky (Tr. 11-12).

The Moussas reported the matter to the police who upon investigation noticed that a classified telephone book in the house was open to the taxicab listings. The police accordingly contacted various taxicab companies to ascertain whether any of their cabs had picked up a fare at the Moussa's residence during the period of their absence. It was found that Mr. William S. Garry, a Yellow Cab driver, had been directed to the Moussa's residence on January 19, 1964, in response to a telephone call. Mr. Garry advised the police that he had picked up a man at this address on January 19, a Sunday, at 4:00 p.m. The man had put several packages which appeared to be sound equipment and whiskey cases in the cab and asked to be taken to an apartment house at 1700 T Street (Tr. 21-22). After a stop there, he went to 9th and U Streets, N. W., where he was dropped off. He had been in the cab for a total of not more than twenty-five minutes (Tr. 25).

Identification of Defendant: Defendant was implicated in this offense solely as a result of his identification by Mr. Garry as the man who had taken the taxi from the Moussa's residence. He was never identified as being in the area. The missing items were never found to be on the defendant. Similarly, no finger prints were found.

Mr. Garry testified that he identified the defendant from police photographs as his fare, four or five days after the pick-up at the Moussa residence (Tr. 37). The police made no effort to require Mr. Garry to identify the defendant at a police line-up or on some other basis. Instead, following Mr. Garry's selection of defendant's photograph, the next — and first — time that he made such an identification in defendant's presence was at a presentment hearing in the Court of General Sessions, where, of course, the defendant was clearly singled out, sitting at counsel table, in the same manner as in the trial below (Tr. 38).

Mr. Garry repeated his identification of defendant at the trial below, and further testified as to his appearance and clothes. Mr. Garry, however, admitted that he could not remember the clothes of other fares he had driven on that day, that he had driven over 100 fares between the trip in issue and his identification of Hardy, and that there was nothing "suspicious" about the trip (Tr. 35-36, 42).

Defendant's testimony: Defendant took the stand and denied that he had committed the offense in question. During cross-examination, he denied that he was in the Georgetown area on the day in question. He testified that he was with a girl at the Cadillac Hotel located at 1500 Vermont Avenue, N. W., where he had been living for nine days (Tr. 57-58). He further testified that he and his counsel had been unable to locate this girl after his arrest, since she had moved with her family (Tr. 59). In this connection, it is pertinent to note that defendant was arrested on February 3, 1964, whereas the trial did not commence until November 2, 1964. Throughout this period, he was incar-

cerated. He had been committed to St. Elizabeths for mental examination, and several different attorneys had been appointed by the court to represent him, the last attorney being appointed September 23, 1964, over nine months after the offense in question.

The Assistant United States Attorney also asked defendant to testify as to other people whom the defendant had seen while he was at the hotel and defendant mentioned several persons (Tr. 62-64). The court sustained defense counsel's objection to this line of inquiry as irrelevant and immaterial (Tr. 65).

Assistant U. S. Attorney's Recess to Check Defendant's Testimony: Following the defendant's testimony, the Assistant United States Attorney requested a recess so that the police officers could make an investigation of defendant's story (Tr. 71). Following an overnight recess, the attorney stated that the Government had no "rebuttal testimony to that testimony" of the defendant (Tr. 74).

The Comments of the U. S. Attorney and the Court: Notwithstanding these representations to the Court, and the equal availability of the Cadillac Hotel's register to the Government, and despite the Court's ruling sustaining defendant's objection to the Assistant U.S. Attorney's questioning regarding defendant's failure to call acquaintances at the trial, the Assistant United States Attorney argued to the jury as follows:

> "Where are these three friends the defendant says he was with at different times in the hotel? Where are the records to substantiate where he was? He and he alone has told you about the hotel." (Transcript of Closing arguments, p. 11).

Similarly, notwithstanding its prior ruling, the Court itself sought to condemn defendant on this basis, stating in its remarks to the jury:

> "He further testified that all of that day there was a woman companion with him and also that he talked to three or four friends during the day. None of them have been called by the defendant to corroborate him." (Tr. 89).

The Court's Ruling and Defendant's Motion for Directed Verdict, and Other Rulings: Following the close of the Government's case, defendant, by counsel, sought respectfully to address the Court, out of hearing of the jury, so that he could make a Motion for a Directed Verdict (Tr. 51-52). The Court, however, instructed counsel to make any motion in the presence of the jury (Tr. 51). Counsel then made a motion for directed verdict, which was summarily rejected by the Court, in the jury's presence, on the ground that the case presented "a question of fact for the jury" (Tr. 52). There was no explanation by the Court of the effect of its denial of the motion on the jury's own deliberations.

Throughout the trial, the Court was peremptory in instructing defense counsel as to the proper conduct of the case. Below are a few examples of the tenor of the Court's remarks: When counsel had protested in good faith the procedure under which the witness, Mr. Moore, had been permitted to place his hand on the defendant's shoulder, it advised him, in the presence of the jury, "Don't make objections unless you are sure of them" (Tr. 27). When counsel sought to cross-examine Mr. Moore, the Court cautioned him, "Don't make any statements, just ask questions" (Tr. 33). In discussing appropriate instructions, the Court advised counsel, "Don't waste time on elementary matters" (Tr. 74).

STATUTES INVOLVED

Sections 1801 and 2201 of Title 22, D.C. Code, provide:

§ 22-1801.

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or

chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

§ 22-2201.

Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

STATEMENT OF POINTS

1. There was error committed by the critical remarks of the U. S. Attorney and the Court concerning defendant's purported failure to introduce evidence which (i) was equally available to the Government and/or (ii) immaterial to the proceedings in the case. Additionally, by these comments, the Court placed the burden of proof on the defendant to corroborate his testimony and in effect prove himself innocent of the offenses. See Tr. 52-74, 89, Closing Argument Tr. p. 11

2. The Court erred in requiring defendant's counsel to make motions in the presence of the jury, including particularly a motion for directed verdict. See Tr. 51-52

3. These errors were prejudicial and require reversal, particularly in the context of the close question of fact presented in the case and in view of the conduct of the trial court below. See Tr. 25, 27, 33, 51, 64, 74

SUMMARY OF ARGUMENT

1. It is error to comment adversely on a defendant's failure to introduce evidence which is equally available to the Government. In contravention of this principle, the prosecuting attorney expressly

criticized defendant's failure to introduce the register of the Cadillac Hotel, to which the Government had full access.

2. Additional error was committed by the prosecuting attorney's emphasis on the defendant's failure to call several acquaintances whose testimony would clearly have had no relationship to the issues in the case. This error was further aggravated by similar remarks by the Court to the jury. Under established authorities, such remarks were clearly improper.

3. These remarks by the U. S. Attorney and the Court also constituted error because their effect was to transfer to the defendant the burden of corroborating his testimony on points which were not in issue and which did not relate to the essential facts in dispute. Indeed, the remarks had the effect of requiring defendant to prove himself innocent. To place this burden on any defendant is clearly prejudicial, and to place it on an incarcerated defendant is to insure conviction.

4. The Court's insistence that defense counsel make all motions before the Court, including a Motion for Directed Verdict, in the presence of the jury, was in error. Such procedure results in untoward prejudice towards defendants inasmuch as the jury, not being schooled in the niceties of legal procedure, could very well construe such a denial as an expression by the Court of its determination that the defendant is guilty.

5. The material prejudice to defendant from these errors is manifest on this record. This is true particularly in view of the trial court's manner of dealing with defense counsel during the trial which seriously hampered the defense, and the very close question of fact with respect to defendant's guilt. The Government's entire case rested on his identification by a taxicab driver under quite limited circumstances; the errors noted above, coupled with the hostile tenor of the Court, could very well have resulted in the jury's conviction of the defendant on an improper and unfair basis.

ARGUMENT

I.

Defendant Was Improperly Prejudiced by the Remarks of the U. S. Attorney and the Court Regarding Defendant's Failure To Introduce a Hotel Register, Which Was Equally Available to the Government, and To Produce Certain Acquaintances Whose Testimony Would Not Have Been Relevant to the Case.

As we have noted, in his remarks to the jury, the Assistant U. S. Attorney condemned the accused's testimony by reason of his failure to introduce the records maintained by a third party; namely, the register of the Cadillac Hotel, 1500 Vermont Avenue, N. W., Washington, D. C.

This was a clearly improper and prejudicial remark by the Assistant United States Attorney. As noted, he had expressly requested a recess the day before in which to contact the police so that an investigation could be made of the defendant's story. He had the fullest opportunity to inspect the register of the Cadillac Hotel, and the record makes it quite clear that he did so. The register was clearly accessible to the Government. Following the Government's investigation, the Assistant U. S. Attorney announced to the Court that he had no "rebuttal testimony" to offer. Nevertheless, he felt free to argue that defendant was lying because the register was not introduced.

It is well established that such a contention is improper. See e.g., *Moyer v. United States,* 78 F.2d 624 (9th Cir. 1935); *Egan v. United States*, 52 App. D.C. 384, 287 Fed. 958, 969-970 (1923); *Grunberg v. United States*, 145 Fed. 81, 88 (1st Cir. 1906); *Sacramento Suburban Fruit Loan Co. v. Boucher,* 36 F.2d 912 (9th Cir. 1929). See also 23A Corpus Juris Secondum § 1099, pp. 175-176.

As the Court succinctly stated in *Grunberg v. United States, supra:*

> "These rules never have been carried so far as to imply anything against a person charged with an offense by reason of his not calling witnesses, unless witnesses who were presumed to have special knowledge, and as to whom the alleged criminal may be presumed to have had special information or peculiar control, while the prosecuting authorities had neither." (145 Fed. at 88).

As this Court of Appeals itself has stated in *Milton v. United States*, 71 App. D.C. 397, 110 F.2d 556, 559 (1940):

> "It is true that if a witness is equally available to the government and is in a legal sense a stranger to the accused, no presumption arises against him from his failure to call such a witness." (110 F.2d at 559) (emphasis supplied).

The Court in *Rostello v. United States*, 36 F.2d 899, 902 (7th Cir. 1928) further elaborated as follows:

> "Of course there are many instances where comments by counsel or charges by a court upon the unfavorable presumption to be drawn from failure to produce witnesses or papers were held to be proper. But it will generally be found that in most of them there is the element of the absent witness or papers being peculiarly within the control of the party whose failure to call or produce them is the subject matter of the comment." (*ibid.*; emphasis supplied).

In *Luttrell v. United States*, 320 F.2d 462 (5th Cir. 1963), one of the grounds for appeal was that when, during his argument, defense counsel had referred to the failure of the Government to produce as a witness a co-defendant who had plead guilty, the Court had interrupted and stated that this was not proper comment, since the witness had been equally available to both sides. The Court of Appeals stated:

> "[T]he record here fails to indicate any partiality of this absent witness toward the Government, or any

> hostility or opposition toward appellant. This being so, it is clear that no unfavorable inference against the Government could be drawn from its failure to call this witness, he being equally available to both sides. Shurman v. United States, 233 F.2d 272, 275 (5th Cir. 1956); United States v. LeRocca, 224 F.2d 859, 861 (2d Cir. 1955). And this being so, the argument was improper because counsel in his argument 'should confine himself to a discussion of the facts discovered by the evidence on legitimate inference deductible therefrom.' (12 Cyc. Fed. Pro. § 48.166)." (320 F.2d at 465).

Clearly, the same standard applies to similar remarks by the prosecuting attorney.

Additional error was committed when the Court joined the U. S. Attorney in likewise adversely commenting on defendant's failure to call several acquaintances whom the defendant had merely mentioned, in response to the cross-examination of the Assistant U. S. Attorney that he had seen during his stay at the hotel. As we have noted, the Court during this cross-examination ruled, in response to defense counsel's objection, that such questioning with respect to these witnesses was immaterial.

There was clearly no basis upon which defendant could have called these acquaintances. He had not testified that they had been with the defendant during the period in which he was accused of participating in a housebreaking. As the Court had initially ruled, their testimony was completely immaterial to the case, and accordingly, the comment was improper. Compare *Himmelfarb v. United States*, 175 F.2d 924, 951 (9th Cir. 1949).

The law is clear that the calling of witnesses who would furnish mere corroboration, at best, of testimony relating to parts not directly pertinent to the issues is not a proper subject of comment. As the Court stated in *Sacramento Suburban Fruit Lands Co. v. Boucher*, 36 F.2d 912, 913 (9th Cir. 1930):

> "Failure of a party to call an available witness possessing peculiar knowledge concerning facts essential to a party's case . . . gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of the party. . . No such inference arises where the only object of calling such witness would be to produce corroborative * * * evidence . . ." (emphasis supplied).

To be sure, this Court in *Lawson v. United States*, 101 App. D.C. 332, 248 F.2d 654, 655 (D.C. Cir. 1957) *cert. denied* 355 U.S. 963 (1958) held that no error was committed in that case by the prosecuting attorney's comments on the defendant's failure to call "certain witnesses." But that case involved persons who could truly be regarded as witnesses. This is established by the fact in reaching its conclusion, this Court cited *Smith v. United States*, 234 F.2d 385, 389 (5th Cir. 1956); *Rice v. United States*, 35 F.2d 689, 694-695 (2d Cir. 1924), which involved comments with respect to the failure to call persons who could have presented material evidence on the matters in issue in those cases.

Beyond this, the actions of the Assistant U. S. Attorney and the Court implicitly reflect an untenable premise that the burden was on the defendant to corroborate his alibi and in effect establish his innocence. This is contrary to a fundamental principle of law that the burden of proof at all times remains on the Government. As the Court stated in *Falgout v. United States*, 279 F. 513, 515 (5th Cir. 1922):

> "* * * After, as well as before, that evidence was adduced, the burden was on the prosecution to prove that when the crime was committed the defendants were at a place at which they could take part in the commission of it and that they did participate in committing it."

See also *Thomas v. United States*, 213 F.2d 30, 33, 34 (9th Cir. 1954).

Indeed, if it can be said that either side had an obligation to call these witnesses or introduce this evidence, it was the government which

at all times had the burden of proof. See *Sacramento Suburban Fruit Loan Co. v. Boucher, supra:*

> "Thus, if it could assert that either side was under obligation to call these witnesses, that obligation rested more heavily upon the appellee, who had the burden of proof, than upon the appellant, who could rely on the appellee's failure of proof." (36 F.2d at 916).

II.

The Court's Insistence That Defendant's Counsel Make All Motions, Including a Motion for Directed Verdict, in the Presence of the Jury Violated Proper Judicial Procedure.

It was unprecedented and serious error to require defendant to present any motion in the presence of the jury, including particularly a motion for directed verdict. We have found only one case in which this point has been alluded to; there, this was held to justify reversal when combined with other circumstances, deemed prejudicial to the defendant. See *Robertson v. United States,* 84 App. D.C. 185, 171 F.2d 345 (D.C. Cir. 1948). However, it has long been regarded as fundamental to the proper conduct of trials that a Motion for Directed Verdict be made and heard outside the presence of the jury. The Court's summary refusal to permit counsel to present this motion by means of a hearing at the bench, or some other method, so that it could be considered outside the presence of the jury is a serious deviation from accepted practice. To a jury untrained in the niceties of legal procedure, the effect of such a motion could very well be to convey the impression that the judge regarded the defendant as guilty. To be sure, the Court stated, in denying motion, that the case "presented a question of fact for the jury," but in the absence of any explanatory instructions or further elaboration, the possible effect of this ruling on the jury could be seriously prejudicial to defendant.

In any event, we submit that as a matter of proper judicial administration, the Court should not permit a procedure under which defense counsel is required to make its motions in the presence of the jury. To impose such procedure is to impair defense counsel's freedom of action to consider the making of motions or objections on sensitive issues, which should be heard outside the hearing of the jury.

III.

The Above-cited Errors Were Prejudicial and Require Reversal of Defendant's Conviction, Particularly in View of the Overall Conduct of the Trial by the Court Below and the Close Question of Defendant's Guilt Presented on the Record.

The above-noted errors are prejudicial and require reversal of this case.

The demeanor of the court below in its treatment of the defense counsel, previously noted, further aggravated the seriousness of the errors in the case. The actions of this particular trial court have been held in several recent cases to require reversal because of the prejudice to defendant and his counsel. See *Horace Lee v. United States of America*, ___ F.2d ___, No. 18,501 (dated April 14, 1965); *Young v. United States of America*, ___ F.2d ___, No. 18,615; *Simmons v. United States*, ___ F.2d ___, No. 18,662 (both decided March 19, 1965), United States Court of Appeals for the District of Columbia. We do not assert here that any of the statements of the Court to defense counsel were in themselves prejudicial, nor do we assert that the Court itself was motivated to provide defendant an unfair trial; the record reflects several rulings which were favorable to defendant.

Nevertheless, the overall tenor of the court's remarks clearly resulted in the trial below being less than the fair and considerate hearing to which the defendant is entitled, and below the standard for such trials which should apply in the District Court. It is manifest that the Court's

action seriously circumscribes defense counsel in his bona fide efforts to provide the defendant with a proper defense in the case.

In the first place, such action cannot help but seriously fetter any member of a bar who has been schooled in the basic tenet of this profession to give the Court the utmost deference and respect at all times. Perhaps more important, it restricts defense counsel's assertion of points in defense of his client because he must concern himself with the possibility that such assertion will lead to a wrangle or summary rejection by the Court in the presence of the jury, which he knows could very well leave the jury with a poor impression of counsel to the defendant's prejudice. These considerations have particular applicability in this case. The Government's case against him was quite thin. As noted, it rested entirely upon his identification by a taxicab driver who had driven him in his cab for 25 minutes. Accordingly, any one of the errors cited above, combined with the Court's treatment of counsel, could have made the difference and resulted unfairly in the jury's verdict for conviction.

CONCLUSION

For the reasons stated, the judgment of the District Court should be reversed.

Respectfully submitted,

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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,162

CLYDE L. HARDY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
JOHN R. KRAMER,
Assistant United States Attorneys.

Cr. No. 249-64

QUESTIONS PRESENTED

In the opinion of appellee the following question is presented:

Is it plain error or error at all for the prosecuting attorney to follow defense counsel's lead in closing argument and ask the jury to consider the uncorroborated nature of appellant's alibi in light of appellant's reference to friends who could substantiate it and the absence of any such witnesses or for the trial court to note that appellant did not call any of the witnesses he mentioned or for the trial court to refuse, in the presence of the jury, to grant a directed verdict because a question of fact remained for jury decision?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,162

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted, tried by jury, convicted, and sentenced to imprisonment for concurrent periods of twenty months to five years on one count of housebreaking in violation of 22 D.C. Code § 1801 and one count of grand larceny in violation of 22 D.C. Code § 2201, said sentences to commence upon the expiration of a ten-year sentence imposed upon appellant in Crim. No. 453-63, affirmed by this Court in *Hardy and Ferguson* v. *United States*, Nos. 18,079 and 18,148, decided August 20, 1964, *cert. denied*, April 26, 1965 (No. 887 Misc., O.T. 1964).

The crimes of which the jury found appellant guilty consisted of the theft on January 19, 1964, of property valued at over $100 from the unoccupied but locked home of Mr. and Mrs. Pierre Moussa at 1547 - 33rd Street, Northwest, in the District. Mrs. Moussa, who was in France at the time with her husband, a director of the World Bank, testified that the property taken included a small Japanese transistor radio of two to three years' vintage and $40 cost, a Westinghouse portable phonograph which cost more than $100 a year ago, two cases of whiskey worth $50 each, and an eight-year-old slide projector (Tr. 8-12). The thief had apparently entered the home by breaking the lock on the basement door (Tr. 9, 48) and had apparently left by means of a taxi obtained through use of the classified phone book in the basement, which was still open to the taxi page (Tr. 13, 48-49).

This clue ultimately led Detective Reverdy Orme of the Seventh Precinct to Yellow Cab driver, William Garry, whose manifest or trip record sheet for January 19, 1964, indicated that at approximately 4 P.M. he answered a radio call to the 33rd Street address (Tr. 17-19). Mr. Garry identified appellant as the passenger he picked up on that call (Tr. 27). He first saw appellant when appellant came to the front door of the house, announced he would be right out, and exited a few minutes later from the lower entrance, from which, during the course of several trips, he carried two cases of whiskey and a large record player to the back seat of the taxi (Tr. 20-21, 27, 30, 32-33). Mr. Garry pointed out that he had many occasions to speak with and confront appellant face to face, not only during the loading and unloading of these items, but also when he leaned over the front seat and talked directly to appellant at various stops for red lights (Tr. 25-27, 36). All in all, Mr. Garry spent some twenty-five minutes with appellant, from the time his cab was loaded until the time appellant finished storing the items in an empty attendant's shack on a deserted parking lot at Ninth and U Streets, Northwest (Tr. 22-25). En route to that lot, appellant first told Garry

to go to Ninth and Rhode Island, then switched to an apartment house in the 1700 block of T Street, where he debarked for a few minutes (Tr. 22-24). Several days after this incident, Mr. Garry selected appellant's picture from an assortment of photographs and slides shown to him by the police (Tr. 37, 39-40).

At the close of the Government's case, appellant's counsel stated that he "would like to address the Court, perhaps out of the hearing of the jury, on a motion." (Tr. 51). The trial court refused to exclude the jury unless extended argument was foreseeable and counsel proceeded to request a judgment of acquittal. The judge denied this, saying "I think there is a question for the jury here, a question of fact for the jury. Motion denied." (Tr. 52).

Appellant took the stand and denied any involvement in the crimes, claiming that on the day in question he was in the Cadillac Hotel at 1500 Vermont Avenue, Northwest, from 2:30 a.m. until 7 or 8 p.m. (Tr. 57-59). He was with a girl that day whom his counsel had been unable to locate and, during the nine-day period from the 11th to the 21st of January while he was staying at the hotel rather than his home at 1231 Fourth Street, Northwest, he occasionally came into contact with other people, including Leroy Ferguson, Valentine, Nick or Nicholas, and Wesley, although he was not sure of the exact days (Tr. 57-58, 62-64). An objection was sustained to the Government's questioning appellant as to whether "any of those people [are] here in the courtroom." (Tr. 64-65). On cross-examination appellant admitted being convicted of five crimes from 1954 to 1962 (Tr. 56).

In the course of his closing argument, appellant's counsel made much of the fact that there had been no Government witnesses connecting his client with anyone residing in the apartment house on T Street or any personnel at the parking lot (Transcript of Closing Argument, p. 7). Replying in rebuttal to this where-are-they-now line of argument, Government counsel asked the jury

"Don't you think you have a right to ask something about where this woman is? Where are these three friends the defendant says he was with at different times in the hotel? Where are the records to substantiate where he was? He and he alone has told you about the hotel." (Transcript of Closing Arguments, p. 11).

The trial court, in making its expressly non-binding commentary upon the facts (Tr. 78-79, 85-86, 89-90) noted that appellant had not called either his woman companion or any of his friends to corroborate his presence in the hotel on the crucial day (Tr. 89).

SUMMARY OF ARGUMENT

It was not plain error or error at all for the prosecutor to answer defense counsel's closing argument directed to attacking the lack of any corroboration in the Government's case, including the Government's failure to produce witnesses whose existence it never asserted, by asking the jury to take into account the fact that appellant's alibi was founded solely upon his own testimony absent any testimony from friends of his who, he had alleged, could support it. The prosecutor did not request the jury to apply the missing witnesses—unfavorable testimony formula under the circumstances, but even if he had, this Court has found such remarks permissible.

It was not plain error or error at all for the trial court in commenting upon the evidence (which, the court underlined, it was up to the jury to evaluate) to note that appellant had not called any of the witnesses whose names he mentioned to support his alibi where the court did not tell the jury that it could infer that the witnesses would bolster the case for the prosecution and did make clear to the jury the heavy burden of proof upon the Government.

It was not plain error or error at all for the court to refuse a directed verdict in the presence of the jury on the ground that a question of fact was presented for jury

decision, since the jury heard no inadmissible evidence and was not informed of the court's opinion on the merits.

ARGUMENT

Appellant's contentions are without merit

(Tr. 51-52, 57-59, 62-65, 77-79, 85-86, 90; Transcript of Closing Arguments, pp. 7-11).

Appellant contends that his convictions should be reversed because of certain statements made by the prosecuting attorney and the trial court concerning the absence of any witnesses to his sojourn at the Cadillac Hotel, statements to which he indicated no objection whatever at trial.[1] Appellant now labels as plain reversible error remarks by the Government lawyer pointing out to the jury that appellant was the only witness in his own behalf, unsupported either by the woman who he alleged was with him at the hotel on the crucial day, by his four friends who he claimed saw him there at various times, or any record (Tr. 57-59, 62-64; Transcript of Closing Arguments, p. 11). This accurate summary of the state of the evidence before the jury, made in response to the invitation previously extended to the jury by appellant's counsel to note evidence that was not forthcoming as well as evidence that was (Transcript of Closing Arguments, pp. 7-8),[2] was entirely proper. What the prosecutor said

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[1] *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 296 F. 2d 434 (1961), *cert. denied*, 372 U.S. 919 (1963), places failure to object to closing argument or to ask the court to instruct the jury to disregard the prosecutor's remarks in the same category as neglect of Rule 30, Fed. R. Crim. P., with respect to the standard of reversibility on appeal. See *McAbee* v. *United States*, 111 U.S. App. D. C. 74, 294 F.2d 703 (1961), *cert. denied*, 371 U.S. 865 (1962) for application of Rule 52(b), Fed. R. Crim. P., to judicial reference to nonpresent witnesses.

[2] Appellant's attorney's remarks, as contrasted with those of the Assistant United States Attorney, had no foundation in the record, since there was no evidence that appellant saw or talked to anyone at the building or parking lot in question. Appellant complains of reference to names he used to people his defense, while himself

was not equivalent to the standard missing witness argument or instruction which is the subject of the cases cited by appellant. He was directing the jury's attention to the historical fact of who did and who did not testify, completing the picture of the case left unfinished by appellant's lawyer. There was no direction that the jury must infer that the unheard-from witnesses, if called, would have supplied evidence to disprove appellant's alibi. Rather, the thrust of the prosecutor's rhetorical questions was to suggest that the named persons did not exist as witnesses in the case, were available to no one but appellant's cross-examined imagination. Appellant, the prosecutor was implying, was lying when he mentioned these people to bolster his tale. The propriety of demonstrating the thinness or weakness of the case of the other side is unchallengeable and was, ironically enough, the essence of appellant's own argument to the jury (Transcript of Closing Arguments, pp. 7-10).

If the Government attorney's comments are construed as comparable to those reviewed in *Lawson* v. *United States*, 101 U.S. App. D.C. 332, 248 F.2d 654 (1957), *cert. denied*, 355 U.S. 963 (1958), then this Court has already approved them as permissible.[3]

The trial judge's statement that appellant did not call any of the witnesses he asserted had contact with him

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referring to the Government's failure to produce people whose existence it never asserted.

[3] The witnesses mentioned were not equally available to the Government. They included appellant's female roommate, his companion in prior narcotic sales, see *Hardy and Ferguson, supra*, and three other friends whose last names he was unable to supply, which would certainly not enhance the Government's locating them. His hearsay testimony that his lawyer was unable to find the vanishing girl merely substantiates the prosecutor's point—the witnesses were unavailable because nonexistent. In *McAbee, supra*, there was, at least, independent evidence in the form of the return on a subpoena that a marshal could not find a specified witness. That the witnesses' testimony in support of his presence in the hotel and, hence, his alibi would be material to the facts of the case should be obvious. See generally, *Milton* v. *United States*, 71 U.S. App. D.C. 394, 397, 110 F.2d 556, 559 (1940).

at the hotel in order to corroborate his story was a fair presentation of what had, in fact, occurred at the trial. It was surrounded by repeated underscoring by the trial court of the non-binding quality of its discussion of the evidence (Tr. 77-79, 85-86, 89-90). It was not a missing witness instruction. The judge did not tell the jury that it could deem the witnesses they hadn't heard to have supplied evidence favoring the Government. Compare *McAbee, supra* (finding no error in a full-fledged missing witness instruction). Nor did the judge characterize appellant's testimony as false or otherwise prejudice his defense. To insinuate that the absence of the witnesses would not have crossed the jury's mind had not the court raised the issue is to insult the jury's practical intelligence.[4] Their absence was a patent factor in the case to which the jurors could attach whatever significance they might desire. Mere judicial recognition of the existence of such a factor does not amount to plain error, particularly where, here as in *Lawson, supra*, the court fully advised the jury that the burden was on the Government to prove appellant guilty beyond a reasonable doubt.

Appellant's contention that it was "an unprecedented and serious error" to require him or, indeed, any defendant to present *any* motion in the presence of the jury, constitutes hyperbole disguising a claim so weak that appellant himself was hesitant to raise it at trial and wisely refused to press it ("perhaps out of the hearing of the jury", Tr. 51). Nor is he able to proffer any support in reported cases for such a broad-gauge rule. Although motions involving the admissibility of evidence, including motions to suppress illegally seized material or illegally obtained confessions, should be entertained in the jury's absence, *e.g., Perrygo* v. *United States*, 55 App. D.C. 80,

[4] The trial court's sustaining of objections to the prosecutor's asking appellant whether any of the people appellant named were presently in the courtroom (Tr. 64-65) reveals not that the trial judge believed that the presence or nonpresence of the people as witnesses during the trial at some point was irrelevant, hence, excludible, but that he felt that their presence in the courtroom at any particular moment was totally immaterial.

83, 2 F.2d 181, 184 (1924), there is no reason for requiring the jury to be dismissed merely because a defendant makes a motion for mistrial or directed verdict unless the trial judge anticipates extra-evidentiary argument that might prejudice jury deliberation. This, indeed, is the standard applied by the court in this case (Tr. 52). That the trial court expressly found that a question of fact remained for the jury to consider was no doubt prejudicial in that it meant appellant had to be judged by twelve good men and true who disbelieved him, but this prejudicial consequence was a product of the judge's act in refusing himself to acquit, not of the purely neutral language he employed in rendering this decision. *Robertson* v. *United States*, 84 U.S. App. D.C. 185, 171 F.2d 345 (1948) in which, when defense counsel moved for a judgment of acquittal, the trial court referred, in the jury's presence, to his prior suggestion that defendant plead guilty to the offense for which he was on trial is miles away from this case where the court left appellant's guilt or innocence to the jury unencumbered by expressions of his own opinion on the merits.

Appellant realizes that nothing the court said to his counsel was prejudicial. It would be fruitless for this Court to follow his fanciful lead in pursuing through the record the evanescent spirit or tenor of the trial court's remarks. If trial counsel held something back because of fear of judicial opposition, let him say so. If not, appellant should desist from attacks on the conduct of a member of the judiciary wholly unsupported by any evidence in the case. It is the trial of a convicted criminal that this Court has before it for review, not the trial of the unspecified courtroom behavior of a judge.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,162

CLYDE L. HARDY,

Appellant

v.

UNITED STATES,

Appellee

Appeal From the United States District Court
for the District of Columbia

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Attorney for Appellant
(Appointed by this Court)

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APPELLANT'S REPLY BRIEF

Appellant submits that the Government's brief confirms that prejudicial errors were committed below:

1. There is no explanation of the prosecuting attorney's improper closing argument with respect to the hotel register, which he had arranged to have investigated the night before he made this argument. As the Government's silence on the point demonstrates, his comments were clearly not defensible.

2. Nor does the Government present any meaningful justification to support the Court's and the prosecuting attorney's improper references to defendant's failure to produce several acquaintances whom defendant mentioned, *as a result of cross-examination by the prosecuting attorney*, that he had seen during his eight to nine-day stay at the hotel. (Tr. 57.)

It is clearly a misnomer for the Government to refer to these persons as "witnesses." The offense in question took place on a Sunday afternoon. Defendant's alibi was that he was alone in a room in the hotel with a girl at the time of the alleged offense. The simple fact that defendant had during his stay seen several acquaintances could have no material bearing on the issues at hand; and indeed, if defendant had sought to call them, their testimony that they observed him at times wholly unrelated to the purported time of the offense would have clearly been regarded as irrelevant. Accordingly, the Government citation of *McAbee v. United States*, 111 U.S. App. D.C. 74, 294 F.2d 703 (1961), *cert. denied*, 371 U.S. 865 (1962), is completely misplaced. There, the missing person subject to a permissible comment in that case was clearly a witness, inasmuch as the defendant had testified that he had procured the stolen articles in question from him. In contrast, in the present case, the missing acquaintances would clearly have not supplied any information with respect to the offense.

3. The Government purports to justify the comments of the prosecuting attorney and the Court below on the ground that defense counsel below had noted in his closing argument the Government's failure to produce corroborating witnesses linking defendant with the crime, other than the taxicab driver who had identified defendant from police photographs as the culprit. However, as defendant pointed out in its principal brief, this contention clearly presupposes that defendant was subject to a burden of proof, equal to the Government's, to establish his innocence. It is clear that defense counsel's remarks were proper in

view of the Government's burden of proof; they served to point out the weaknesses of the Government's evidence.

4. Finally, the Government seeks to rely on defense counsel's failure to object to these references in the Court below. This, we submit, demonstrates the prejudice to defendant caused by the procedure imposed by the Court below requiring defendant to raise all motions within the hearing of the jury. In view particularly of the over-all tenor of the Court's treatment of the defense before the jury as noted in appellant's main brief, it is clear that a motion to strike the remarks or to raise an objection would very likely have been met by a peremptory denial. Such action, coming just prior to the jury's deliberations on the case, could only have served to further emphasize in the jury's mind the purported importance of these improper references. Defense counsel was clearly on the horns of a dilemma. Plainly his principal duty was to exert every legitimate effort to gain defendant's acquittal in the Court below, rather than to subvert this objective merely to insure that the error was preserved for purposes of appeal. In short, in the context of this record, the Government cannot avoid the consequences of serious error on this basis. The case, we submit, must be reversed.

Respectfully submitted,

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